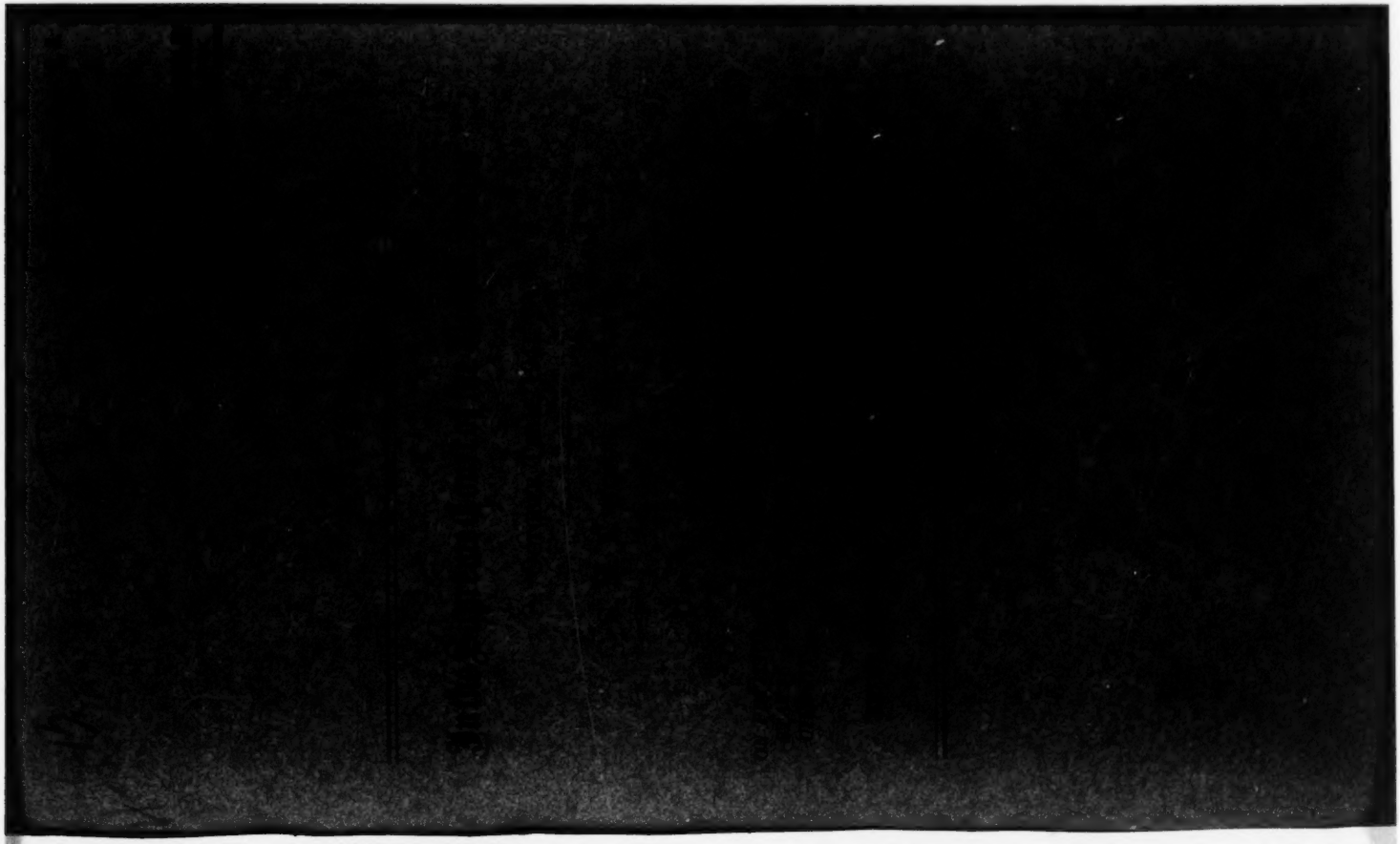

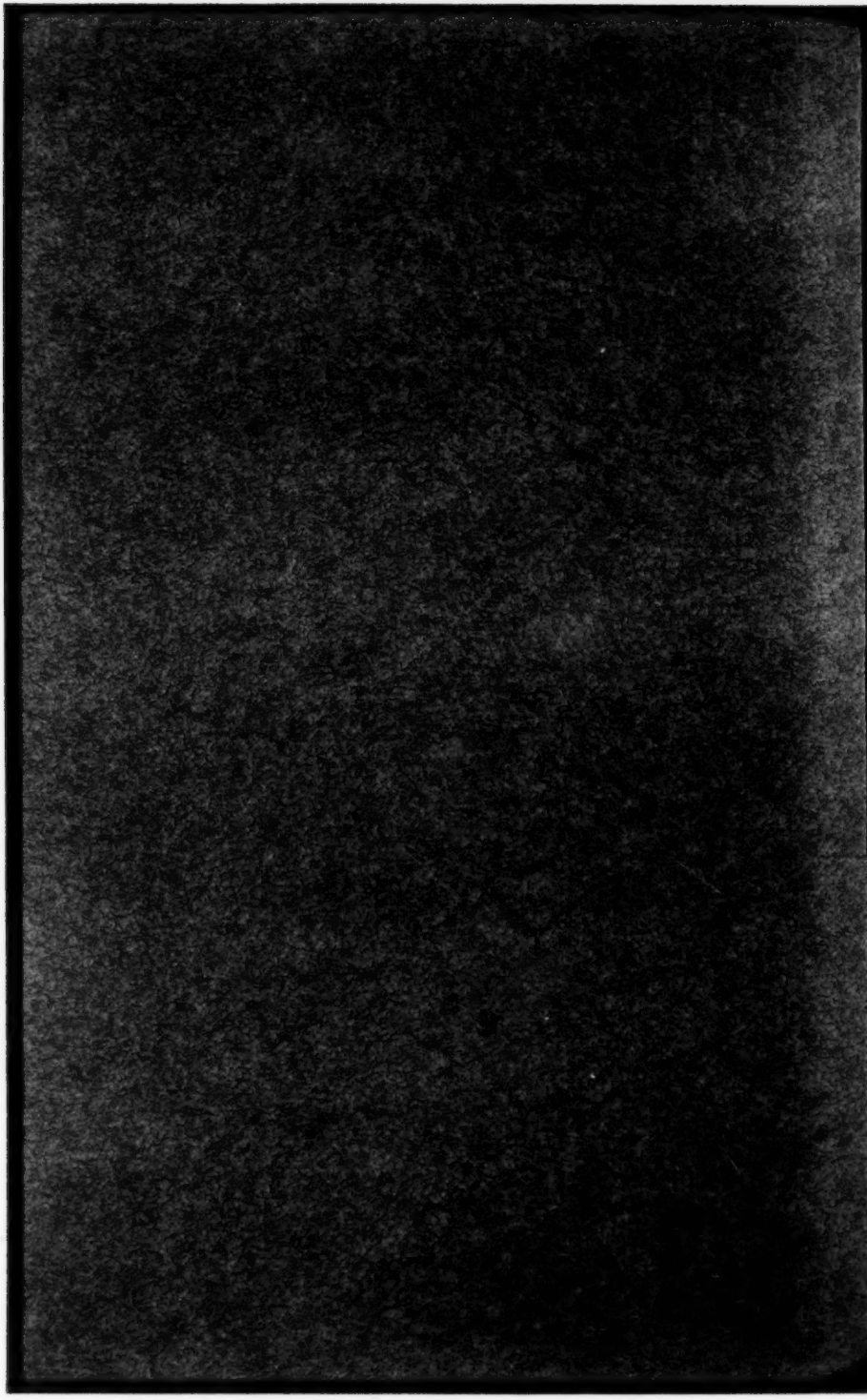

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3 Wigmore, *Evidence* (3d ed., 1940):

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 734

S. M. E. SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (P. R. 234–243) [1] is not yet reported.

[1] Pursuant to stipulation (P. R. 245) the printed record consists of the indictment, verdict, judgment and sentence, the proceedings in the Circuit Court of Appeals, and the portions of the record printed as a supplement to the Government's brief and an appendix to petitioner's brief in the Circuit Court of Appeals. The stipulation provides, however, that the original stenographic transcript of record and the exhibits are to be part of the record here (*ibid.*) Following the form used by petitioner (see Pet. 2), references to the printed record are cited as "P. R." and references to the stenographic transcript as "R." The exhibits will be referred to by number.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 10, 1941 (P. R. 243). The petition for a writ of certiorari was filed November 8, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether it was proper to permit Government counsel, in cross-examining petitioner, to impeach his credibility as a witness by showing prior acts and conduct which reflected upon his integrity or truthfulness.

STATUTE INVOLVED

The pertinent portion of 11 U. S. C., Sec. 52 (b) (1) and (2), reads as follows:

> A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the * * * trustee * * * in any proceeding under this title, any property belonging to the estate of a bankrupt; or (2) made a false oath or account in or in relation to any proceeding under this title * * *.

STATEMENT

Petitioner was indicted in the District Court for the Southern District of West Virginia on seven counts charging violations of 11 U. S. C., Sec. 52 (b) (1) and (2) (P. R. 1–14). The first four counts (P. R. 1–7) alleged that petitioner concealed from the trustee in bankruptcy of his estate certain accounts receivable, some of which had been reduced to judgment, and the fifth (P. R. 7–10) charged that he concealed three parcels of real estate. The sixth and seventh counts (P. R. 10–14) charged false swearing in respect of the assets covered by counts one and two.

Petitioner was convicted upon all counts (P. R. 15) and was sentenced to three years imprisonment on each, the sentences to run concurrently, and to pay a fine of $1,000 each on counts one, two, and five (P. R. 16–17). The Circuit Court of Appeals affirmed the conviction (P. R. 243).

The pertinent facts relating to the question raised by the petition may be summarized as follows:[2]

At the trial petitioner took the stand as a witness in his own behalf (R. 1050). The gist of his testimony on direct examination, and of his whole defense, was that the properties he allegedly con-

[2] Petitioner does not here seek a review of the sufficiency of the evidence and it is therefore unnecessary to delineate the proof adduced at the trial. The evidence, however, is set forth at some length in the opinion of the Circuit Court of Appeals (P. R. 238–240).

cealed belonged to his wife (R. 1050–1104; Pet. 8–10). On cross-examination petitioner was shown, and he identified, the joint federal income tax return filed by him and his wife for the year 1937. In response to the prosecuting attorney's question he admitted that this return did not show an item of profit of $4,000 derived from the sale of a lot. (P. R. 76–77). Though petitioner's counsel objected to the prosecutor's question, counsel admitted that he was wrong after the court observed that the Government was entitled to use the return to test peitioner's credibility. The record clearly shows that the objection was withdrawn (P. R. 76). The return itself was subsequently admitted (G. Ex. 88, R. 1157) solely on the question of petitioner's veracity (R. 1149–1150).

The court also admitted, over objection (P. R. 246), petitioner's individual income tax return for the year 1936 (G. Ex. 90, R. 1176), which he had identified as such at the request of the prosecuting attorney (R. 1146, 1169). This evidence, too, was admitted only for its bearing upon the credibility of petitioner (R. 1175).[3]

Finally, petitioner was shown his sworn application for an immigration visa made at Budapest,

[3] The 1936 return included income derived from Mercy Hospital, one of the items of property allegedly concealed from the trustee. The Government therefore offered the return as evidence that petitioner treated the hospital as his own property and thus to contradict his testimony that it belonged to his wife (R. 1174, 1175).

Hungary, in 1927 to the United States Consular Service,[4] and, under questioning by the prosecuting attorney to which there was no objection, admitted that he stated in the application that he was born in 1907, although the fact was that he was born in 1900 (P. R. 83–84).

ARGUMENT

Petitioner's sole contention here is that the trial court committed reversible error in permitting Government counsel to cross-examine petitioner "concerning three other wholly unrelated, independent crimes or offenses, which the questions and answers tended to show he had committed, and the evidence as to which bore no relation to the charge on which he was tried, and had no tendency whatever to show he was guilty or innocent of the charges being tried" (Pet. 3).[5]

We think petitioner's argument is based upon a misconception of the applicable rule of evidence. We agree with petitioner that evidence showing

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[4] Petitioner came to the United States in 1928 (R. 1051).

[5] In its opinion the Circuit Court of Appeals said with reference to petitioner's contention (R. 240–241): "It is a sufficient answer to this that no such objection was interposed at the time. *Matheson* v. *United States*, 227 U. S. 540, 545; *United States* v. *Carey*, 110 U. S. 51; *Breeden* v. *United* State, 73 F. (2d) 778, 780 (C. C. A. 4). As was said in the last case cited: 'We exercise the power to notice plain error not assigned only where necessary to prevent a miscarriage of justice; and a careful examination of the record convinces us that there is no occasion to exercise it here.'" But as that court considered the merits of the contention, we do so here.

that the accused has committed any crimes independent of and unrelated to the offense for which he is on trial is, as a general rule, not admissible. But that rule, and the cases and authorities cited in petitioner's brief (pp. 14–22), has no application here.[6]

When petitioner took the stand he assumed the role of a witness and as such became subject to cross-examination in the same manner and to the same extent as any other witness;[7] his credibility, like that of an ordinary witness, was subject to impeachment.[8] It is settled, of course, that acts of

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[6] Petitioner's citation (Pet. 25) of Rule 106 (3) of the second Tentative Draft of a Code of Evidence promulgated by the American Law Institute is misleading. That proposed rule provides that no facts tending to prove the commission or conviction of another crime by the accused may be elicited in cross-examination unless he has first introduced evidence of his good character to support his credibility. The proposal is, of course, a revolutionary change in the law; it does not purport to state the law. See Comment a (6) (p. 54).

[7] *Raffel* v. *United States*, 271 U. S. 494, 497; *Fields* v. *United States*, 221 Fed. 242, 244–245 (C. C. A. 4), certiorari denied, 238 U. S. 640; *Coulston* v. *United States*, 51 F. (2d) 178, 181 (C. C. A. 10); *Murray* v. *United States*, 10 F. (2d) 409, 412 (C. C. A. 7), certiorari denied, 271 U. S. 673; *United States* v. *Buckner*, 108 F. (2d) 921, 927–928 (C. C. A. 2), certiorari denied, 309 U. S. 669; *Merrill* v. *United States*, 6 F. (2d) 120 (C. C. A. 9); *United States* v. *Frankel*, 65 F. (2d) 285, 288 (C. C. A. 2), certiorari denied, 290 U. S. 682.

[8] *Raffel* v. *United States*, *supra*; *Fitzpatrick* v. *United States*, 178 U. S. 304, 315; *Reagan* v. *United States*, 157 U. S. 301, 305; *Madden* v. *United States*, 20 F. (2d) 289, 293 (C. C. A. 9), certiorari denied, 275 U. S. 554; *Tucker* v.

misconduct are proper subjects of inquiry on cross-examination for the purpose of impeaching the credibility of a witness, whether he be the defendant or a third party.[9]

Not all courts, agree, however, as to what acts of misconduct are revelant on the question of credibility. The majority rule is that the witness may be cross-examined concerning any kind of misconduct indicative of bad general character. 3 Wigmore, *Evidence* (3d ed., 1940), sec. 982. The minority rule, followed apparently in a few federal circuits,[10] admits only evidence of such misconduct

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United States, 5 F. (2d) 818, 823 (C. C. A. 8); 3 Wigmore, *Evidence* (3d ed., 1940), sec. 890.

[9] *United States* v. *Dalhover*, 96 F. (2d) 355, 360 (C. C. A. 7), certiorari denied, 305 U. S. 632, rehearing denied, 305 U. S. 672; *Tierney* v. *United States*, 280 Fed. 322, 324 (C. C. A. 4), certiorari denied, 259 U. S. 588; *Rees* v. *United States*, 95 F. (2d) 784, 793 (C. C. A. 4); *Krashowitz* v. *United States*, 282 Fed. 599, 600–601 (C. C. A. 4); *Pullman Co.* v. *Hall*, 55 F. (2d) 139, 141 (C. C. A. 4); *Christopoulo* v. *United States*, 230 Fed. 788, 791 (C. C. A. 4).

[10] Cf. *Miller* v. *Territory of Oklahoma*, 149 Fed. 330, 338 (C. C. A. 8); *Coulston* v. *United States*, 51 F. (2d) 178, 181 (C. C. A. 10). The broad generalization that "Acts of misconduct, not resulting in conviction of a crime, are not the proper subject of cross-examination to impeach a witness," found in decisions of the Eighth Circuit (see *Little* v. *United States*, 93 F. (2d) 401, 408 (C. C. A. 8), certiorari denied, 303 U. S. 644, rehearing denied, 303 U. S. 668), must be limited to the facts in each case, in view of *Miller* v. *Territory of Oklahoma*, *supra*. An examination of the *Little* case and the cases cited therein in support of this broad rule reveals that in each case the misconduct concerning which the witness was cross-examined had no direct bearing upon the question of veracity. The acts of misconduct held to be in-

as reflects a lack of veracity, such as fraud, forgery, perjury and the like. 3 Wigmore, *op. cit., ibid.* The testimony elicited on cross-examination of petitioner was admissible under either rule, since it tended to prove that he had in the past made false statements under oath; it thus bore directly on the issue of his credibility as a witness.[11]

CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1941.

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admissible included stealing (*Little* case, *supra*), possession of liquor, intoxication and disorderly conduct (*Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8)), violation of the state blue sky law (*Havener* v. *United States*, 15 F. (2d) 503, 506–507 (C. C. A. 8)), and carrying concealed weapons (*Salerno* v. *United States*, 61 F. (2d) 419, 424 (C. C. A. 8)).

[11] It should be pointed out that there was no suggestion in the prosecuting attorney's cross-examination that these false statements constituted crimes. And the trial court cautioned the jury in his charge that petitioner was on trial only on the charges in the indictment and that the evidence of petitioner's other conduct was introduced only "in order that the jury may determine what weight to give his testimony" (P. R. 179–180).

U. S. GOVERNMENT PRINTING OFFICE: 1941